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No.

In The

Supreme Court of the United States

COUNTY OF TEHAMA; ROBERT A. HEARD; JERRY FLOYD,

Petitioners,

vs.

SHEROL DiRUZZA,

Respondent.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Whether the First Amendment to the United States Constitution prohibits an elected sheriff in a relatively small rural sheriff's department from terminating or otherwise reassigning a deputy sheriff because the deputy had actively and publicly participated in a campaign supporting the sheriff's opponent in an election for the office of sheriff.

2. Whether the Ninth Circuit's determination that the qualified immunity doctrine was inapplicable because of its finding that, "It was clearly established that a non-policy making public employee in a sheriff's office is protected from retaliation for the exercise of First Amendment rights" and "It was thus clearly established, at the time defendants acted, that deputy sheriffs were not per se policy makers in California" is so inconsistent with this Court's qualified immunity jurisprudence that it warrants review by way of writ of certiorari.

3. Where a deputy sheriff charged with a felony enters into a plea bargain under which the charges are reduced to an infraction in return for the deputy's voluntary resignation from the Sheriff's department, can the deputy state a claim for damages against the sheriff in the absence of evidence of prosecutorial misconduct on the theory that the sheriff "influenced" the district attorney's decision to offer the plea bargain in question and that such "influence" was motivated by a desire to retaliate against the deputy for political support of the sheriff's opponents.

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PETITION FOR WRIT OF CERTIORARI

The County of Tehama (hereinafter "the County") along with Robert Heard (hereinafter "Heard") and Jerry Floyd (hereinafter "Floyd") respectfully petition for a writ of certiorari to review the judgment of the United States Court of Appeals for the Ninth Circuit in this case.

OPINIONS BELOW

The opinion of the Court of Appeals (App. 1-36) is reported at 206 F.3d 1304. The opinion of the District Court (App. 37-45) is unreported, as is the order of the Court of Appeals denying Petition for Rehearing and Rehearing En Banc (App. 46-47).

JURISDICTION

The Court of Appeals entered its order denying the Petition for Rehearing and Rehearing En Banc on June 7, 2000. App. 46-47. Petitioners filed this Petition within 90 days of the denial of rehearing pursuant to Supreme Court Rule 13.1. Jurisdiction is invoked pursuant to 28 U.S.C. § 1254(1).

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED IN THIS CASE

The First Amendment to the United States Constitution provides:

> Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people to peaceably assemble, and to petition the government for a redress of grievances.

Section 1 of the Fourteenth Amendment to the United States Constitution provides:

> All persons born and naturalized in the United States subject to the jurisdiction thereof, are citizens of the United States and of the state wherein they reside. No state shall make or enforce any law which shall abridge the privileges or immunities of the citizens of the United States; nor shall any state deprive any person of life, liberty, or property without due process of law; nor to deny any person within its jurisdiction of the equal protection of the laws.

Section 1983 of the United States Code Title 42 provides:

> Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any state or territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress. For the

purposes of this section, any act of Congress applicable exclusively to the District of Columbia shall be considered to be a statute of the District of Columbia.

STATEMENT OF THE CASE

Sherol DiRuzza (hereinafter "DiRuzza") brought the instant lawsuit under 42 U.S.C. § 1983 claiming that the County, its elected sheriff Robert Heard and his immediate Undersheriff Jerry Floyd violated her rights secured by the First Amendment by retaliating against her for her active participation in the campaign of Heard's opponent for the office of County Sheriff. The District Court had jurisdiction over DiRuzza's claims under 28 U.S.C. § 1331. The District Court granted summary judgment in favor of the County as well as Heard and Floyd individually. The Ninth Circuit reversed that decision.

A. Factual Background

Tehama County is a rural county located in Northern California. DiRuzza was a deputy sheriff with the County from 1992 to 1995. App. 2. During the election season of 1994, Heard ran against the incumbent Sheriff Mike Blanusa. App. 2-3. During the campaign, DiRuzza had publicly supported Blanusa in the election and appeared in a televised political advertisement on his behalf. App. 3. In the November 1994 general election, Heard defeated Blanusa. He assumed office as the new sheriff on January 3, 1995. App. 3.

Prior to Heard taking office, DiRuzza was involved in a domestic dispute with her fiancé. According to DiRuzza, her fiancé damaged her car, tore the phone off the wall and threatened her with physical violence. App. 3. The incident culminated when DiRuzza discharged her service weapon several times out a window of her home. App. 3. While Blanusa was still in office, the Sheriff's Department conducted an investigation into the incident, and Blanusa suspended DiRuzza for 30 days without pay. App. 38, fn. 1. The investigation was forwarded to the District Attorney who, on December 15, 1994, charged DiRuzza with a felony of "gross negligent discharge of a firearm" in violation of California Penal Code § 246.3, and a misdemeanor of "exhibiting a firearm in a rude and threatening manner" in violation of California Penal Code § 417 subd. (a) (2). App. 3-4. After a preliminary hearing, a court determined that the charges were supported by probable cause. App. 38, fn. 1.

After Heard took office, the District Attorney offered DiRuzza a plea bargain in which she was allowed to plead guilty to a lesser infraction on condition that she agree to resign her position as deputy sheriff. App. 4 & 38, fn. 1. DiRuzza agreed. App. 4. As part of the agreement she signed a letter of resignation stating her resignation was "voluntarily and with full knowledge of the consequences." App. 38, fn. 2. DiRuzza alleges that Heard and Floyd sought the plea bargain in retaliation for her having supported Blanusa during the election and having appeared in campaign advertisements for him. App. 4. In addition, she alleges that while she served under Heard's administration, she was not formally resworn as a deputy

and was given undesirable shifts and working assignments. App. 4.

B. Proceedings Below

DiRuzza brought the instant lawsuit for damages under 42 U.S.C. §§ 1983 and 1985 claiming that Heard and Floyd's conduct amounted to unlawful retaliation for her exercising her right of free speech protected by the First Amendment to the United States Constitution.[1]

The defendants each moved for summary judgment arguing that all of the actions identified by DiRuzza were the direct result of the pending felony charges against her and that DiRuzza's voluntary acceptance of plea bargain does not constitute a constructive discharge or an act of retaliation by any of the defendants. App. 4. The defendants further asserted a termination of DiRuzza for acts of political support of the sheriff's opponent, if true, would not violate the First Amendment. Heard and Floyd asserted that they were entitled to qualified immunity. App. 4.

On March 4, 1998, the District Court granted defendants' motion for summary judgment. App. 38-45. Relying on *Upton v. Thompson*, 930 F.2d 1209 (7th Cir. 1991), *cert. denied*, 503 U.S. 906, 112 S.Ct. 1262 (1992), *Wilbur v. Mahan*, 3 F.3d 214 (7th Cir. 1993), *Jenkins v. Medford*, 119 F.3d 1156 (4th Cir. 1997) (en banc), *cert. denied*, 522 U.S. 1090, 118 S.Ct. 881 (1998), and *Terry v. Cook*, 866 F.2d 373

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[1] As neither the Ninth Circuit nor the District Court directly addressed plaintiff's section 1985 claims, they are likewise not addressed in this Petition.

(11th Cir. 1989), the District Court held that as a deputy sheriff, DiRuzza was subject to termination on account of her political support for Blanusa. App. 41-42. Alternatively, the District Court found that Heard and Floyd were entitled to qualified immunity. App. 42-45.

On appeal, the Ninth Circuit reversed in a two-to-one decision, with Circuit Judge O'Scannlain filing a dissent. The panel majority held that deputy sheriffs in California are not per se "policymakers" such that they could be terminated for political reasons. The panel found that whether DiRuzza was a "policymaker" depended on an analysis of her actual duty assignments under the following factors:

> vague or broad job responsibilities, relative pay, technical competence, power to control others, authority to speak in the name of policymakers, public perception, influence on programs, contact with elected officials, and responsiveness to partisan politics and political leaders.

App. 11-12.

The panel concluded that there were sufficient material facts to foreclose summary judgment. App. 13.

The panel further rejected the District Court's conclusion that Heard and Floyd were entitled to qualified immunity. The Ninth Circuit reasoned that qualified immunity was unavailable because, "[p]rior to 1995, it was clearly established that a non-policymaking public employee in a sheriff's office is protected from retaliation for the exercise of First Amendment rights." App. 19.

Finally, the panel rejected the defendants' argument that irrespective of the constitutional analysis, defendants

were entitled to summary judgment on the grounds that, as a matter of law, their conduct could not amount to unlawful retaliation. App. 21-23. In so concluding, the panel majority held:

> [t]he facts are disputed concerning the influence of defendants Heard and Floyd on the subsequent actions taken by the district attorney . . . and that this influence was motivated by a desire to retaliate against DiRuzza for her political support of the incumbent sheriff.

App. 22.

The defendants filed a timely petition for rehearing and rehearing en banc with the Ninth Circuit. The petition for rehearing en banc was denied on June 7, 2000. App. 46.

REASONS FOR GRANTING A WRIT OF CERTIORARI

In this matter, the defendants seek review of the three separate holdings of the Ninth Circuit: (1) that a deputy sheriff in Tehama County is not necessarily subject to termination for having actively campaigned in favor of the elected sheriff's opponent in a contested election; (2) that Heard and Floyd are not entitled to qualified immunity; and (3) that DiRuzza's retaliation claim could proceed forward based on nothing more than a question of fact as to the "influence" Heard and Floyd may have had on the decision to offer the plea bargain and as to their motivation for exercising such influence.

Certiorari is necessary as to all three of these holdings for the following reasons.

Several circuits have now directly addressed the question of whether or not an elected sheriff may dismiss those deputies who actively campaign against the sheriff. Those circuits have arrived at widely varying and inconsistent conclusions. The opinion of the Ninth Circuit in this case simply adds one more voice to the ever widening split among the circuits as to this issue. This case provides a unique opportunity for this Court to provide a focused analysis directly addressing what type of employees are subject to termination for political disloyalty. This is not an issue this Court has had occasion to directly address since its decision in *Branti v. Finkel*, 445 U.S. 507, 100 S.Ct. 1287, 63 L.Ed.2d 574 (1980). Thus, in resolving the split of authority with respect to deputy sheriffs, the Court can provide much needed guidance for lower courts addressing similar issues as to other public employees.

With respect to the Ninth Circuit's qualified immunity analysis, the panel majority adopted a formulation of "clearly established law" which is so generalized that it is useless to any government official attempting to conform his or her conduct to the supposed constitutional norm. In doing so, the Ninth Circuit virtually ignored the whole of this Court's qualified immunity jurisprudence. The nation's largest circuit now has published authority which can be held up as an example as to a level of generality that a purported constitutional norm can be stated to overcome qualified immunity which, if followed, would render qualified immunity essentially a meaningless defense.

As to the third issue, at first blush it would appear that the Ninth Circuit's opinion is nothing more than a finding that a triable issue of fact exists which would not be something that would warrant certiorari review. However, with virtually no analysis the Ninth Circuit recognized an entirely new species of section 1983 liability. No case has ever held that a criminal defendant, absent prosecutorial misconduct, can bring a lawsuit claiming the voluntary acceptance of a plea bargain constitutes a constitutional violation based on the subjective intent of the officials offering the bargain. On this point, the Ninth Circuit is in direct conflict with a well-reasoned decision of the Tenth Circuit. Certiorari is therefore proper not only to resolve the split between the Ninth and Tenth Circuits created by this case, but it is necessary to put an end to the newly created constitutional tort before it is allowed to take root and grow.

I.

CERTIORARI IS NECESSARY TO RESOLVE A SPLIT AMONG THE CIRCUITS AND TO PROVIDE GUIDANCE TO THE LOWER COURTS CONCERNING THE CIRCUMSTANCES UNDER WHICH DISCHARGE OR REASSIGNMENT OF A PUBLIC EMPLOYEE FOR ACTIVE POLITICAL OPPOSITION TO AN ELECTED SUPERIOR IS CONSTITUTIONALLY PERMISSIBLE.

The time has long since passed when by virtue of accepting public employment an individual could be held to surrender his right of free speech. See, *Perry v. Sindermann*, 408 U.S. 593, 597, 92 S.Ct. 2694, 33 L.Ed.2d 570 (1972). Under the modern "unconstitutional conditions"

doctrine, a government "may not deny a benefit to a person on a basis that infringes his constitutionally protected . . . freedom of speech". *Id.*, 408 U.S. at 597. However, First Amendment freedoms are not absolute in the public employment context. In *Pickering v. Board of Ed. Of Township High School Dist. 205*, 391 U.S. 563, 568, 88 S.Ct. 1731, 20 L.Ed. 2d 811 (1968) this Court established a balancing test under which the constitutionality of disciplining or terminating an employee on account of protected speech depends on the "balance between the interest of the [employee], as a citizen, in commenting upon matters of public concern and the interest of the state, as an employer, in promoting efficiency of the service it performs through its employees." *Id.*, 391 U.S. at 568.

In *Elrod v. Burns*, 427 U.S. 347, 96 S.Ct. 2673, 49 L.Ed.2d (1976), this Court looked at the practice of political patronage under which a newly elected official would replace non-civil service employees because they were not members of his political party, and replace them with members of his own party. As Justice Powell explained in dissent, patronage practices had long been sanctioned by history and thought by many to contribute to the effective operation of political parties and to promote democratic ideals. *Id.* at 377-387 (Powell, J. dissenting). Although a plurality, five justices agreed that unless the individual was a "policymaking" or "confidential" employee, the dismissal of an employee for no other reason than party affiliation amounted to an unconstitutional condition and was thus invalid without a need for further balancing under *Pickering*. See, *Elrod v. Burns, supra*, 427 U.S. at 259 (plurality opinion); 427 U.S. at 375

(Stewart, J. concurring in judgment). Four terms later, in *Branti v. Finkel, supra,* 445 U.S. 507, this Court reaffirmed the common holding of *Elrod* but modified the standard for determining whether or not an employee could be terminated for patronage as follows:

> The ultimate inquiry is not whether the label 'policymaker' or 'confidential' fits a particular position; rather, the question is whether or not the hiring authority can demonstrate that party affiliation is an appropriate requirement to the effective performance of the public office involved.

445 U.S. at 518. Since *Elrod* and *Branti,* this Court has had little occasion to provide further guidance on the matter. Since *Branti,* the Court has never directly addressed whether a particular employee was properly subject to termination for political reasons. The need for guidance is particularly acute in those circumstances where the purported termination is not so much on the basis of party affiliation alone, but because the employee actively participates in a campaign against an elected official. Writing for the Seventh Circuit in *Wilbur v. Mahan, supra,* 3 F.3d 214, Judge Posner explained the difference between the two circumstances as follows:

> The restriction on free speech may be greater than in the patronage cases because the employee is an active speaker, and in the patronage cases the employee is penalized less often for what he has said than for his party affiliation and non-affiliation; rarely is he an active speaker. At the same time, the disruptive potential of an employee's candidacy in opposition to his boss is much greater than that of the

> employee who, merely by virtue of a different affiliation, may not be trusted to serve the boss with maximum fidelity and zeal.

3 F.3d at 218. In *O'Hare Truck Service, Inc. v. City of North Lake*, 518 U.S. 712, 116 S.Ct. 2353, 135 L.Ed. 2d 874 (1996), this Court recognized that, indeed, the analysis might vary in the context of active political opposition. At issue in *O'Hare* was whether or not the *Elrod-Branti* principles would extend to an independent contractor. Under the facts of the case, the contractor did more than simply be a member of the wrong party, he supported the defendants' opponent and displayed the opponent's campaign posters at the plaintiff's place of business. 518 U.S. at 715. This Court observed that in such situations the *Elrod-Branti* analysis was "intermixed" with the requirement for "balancing in the *Pickering* context." *Id.* at 719. On remand, this Court directed that either the circuit or district court determine whether the case would be analyzed under *Elrod-Branti* or *Pickering*. *Id.* at 726.

The circuit courts struggling with these issues in the context of deputy sheriffs, have reached "conflicting and confusing" results. *Jenkins v. Medford, supra*, 119 F.3d 1156.

A. Focusing On The Inherent Discretionary Authority Vested In Deputy Sheriffs, The Fourth, Seventh And Eleventh Circuits Have Held Deputies Are Subject To Termination For Political Opposition To Their Sheriff.

In *Terry v. Cook, supra*, 866 F.2d 373, a newly elected sheriff dismissed all the department employees who had opposed his election. *Id.* at 374. The Eleventh Circuit

adopted the *Elrod-Branti* approach. *Id.* at 377. Focusing on the powers vested in deputies, the Court noted deputies act as a general agent and are empowered to exercise the authorities of the sheriff. *Id.* The Court then held:

> [L]oyalty to the individual sheriff and the goals and policies he seeks to implement through his office is an appropriate requirement for the effective performance of a deputy sheriff. Such a requirement strikes at the heart of the *Elrod/Branti* least restrictive means test which balances First Amendment rights of deputies and the need for efficient and effective delivery of public services. We can find no less restricted means for meeting the needs of public service in the case of the sheriff's deputy than to acknowledge the sheriff's absolute authority of appointment and to decline to reinstate those who did not support him.

Id. at 377.

In *Upton v. Thompson, supra,* 930 F.2d 1209, the Seventh Circuit, like the Fourth Circuit before it, focused on the inherent powers of the office of deputy sheriff and concluded that "A sheriff may use political consideration in determining who will serve as deputy sheriff." *Id.* at 1218. The Court reasoned that this was particularly true with respect to "the politically active deputy[ ] vociferously campaigning for the loser . . . " *Id.*

Perhaps the most thorough analysis of the issue is found in the en banc opinion of the Fourth Circuit in *Jenkins v. Medford, supra,* 119 F.3d 1156. There, the Fourth Circuit held a sheriff's dismissal of several deputies based upon their support of another candidate during an

election was permissible. Canvassing the country and analyzing the role that deputies play, the Court observed:

> In jurisdictions where the sheriff is elected by popular vote, the triumph of one candidate indicates voter approval of the candidate's espoused platform . . . By choosing a particular candidate to protect the citizens of the county, the electorate vests in the sheriff broad discretion to set and implement the policies necessary to carry out his goal . . .
>
> Deputy sheriffs play a special role in implementing the sheriff's policies and goals. The sheriff is likely to include at least some deputies in his core group of advisors . . . In the course of their duties, deputies will make some decisions that actually create policy. The sheriff relies on his deputies to foster public confidence in law enforcement. Furthermore, deputies are expected to provide the sheriff with the truthful and accurate information he needs to do his job. In some jurisdictions, the deputy sheriff is the general agent of the sheriff, and the sheriff is civilly liable for the acts of his deputy.

119 F.3d at 1164-65. Turning to the role deputy sheriffs play under North Carolina law, the Court noted that North Carolina deputies "hold an office of special trust and confidence, acting in the name and with powers coterminus with his principle, the elected sheriff." *Id.* at 1163, citing *Gowans v. Alamance County*, 216 N.C. 107, 3 S.E.2d 339, 340 (N.C. 1939) and *Cline v. Brown*, 224 N.C. App. 209, 210 S.E.2d, 446, 449 (N.C. App. 1974) Based upon these factors, the Court held that political loyalty was an appropriate consideration:

> We can think of no clearer way for a deputy to demonstrate opposition to a candidate for sheriff, and thus actual or potential disloyalty once the candidate takes office, than to actively campaign for the candidate's opponent. . . . [W]e do not believe it was ever contemplated that a sheriff must attempt to implement his policies and perform his duties through deputies who have expressed clear opposition to him.

Id. at 1164-1165.

B. Focusing On Whether Individual Deputy Sheriffs Are "Policymakers" The Third And Sixth Circuits Have Held Deputies Are Not Inherently Subject To Politics-Based Terminations.

The Sixth Circuit in *Hall v. Tollett*, 128 F.3d 418 (6th Cir. 1997), held a deputy was not subject to political based termination. The Court first identified four categories of employees who normally are subject to such termination: (1) positions which are specifically vested by law with discretionary authority with respect to enforcement of law or carrying out policy of political concern; (2) persons delegating a significant amount of discretionary authority; (3) "confidential advisors", and (4) "positions filled by balancing out political party representation . . . " *Id.* at 424, citing *McLoud v. Testa*, 97 F.3d 1536, 1557 (6th Cir. 1996). Looking to the day-to-day work assignments, the Court concluded the deputies did not fall into one of these categories. *Id.* at 429. Rather than focus on the impact on the sheriff's ability to implement his policies, the Court focused on the ability of the deputy to perform the general functions of the job. *Id.* ("Defendant offered

no evidence that shows that supporting defendant's political opponent would in any way prevent a Cumberland County deputy sheriff from effectively performing his duties.")

Although often cited as a case where deputies were held not to constitute policymakers, the Third Circuit's opinion in *Burns v. County of Cambria*, 971 F.2d 1015 (3rd Cir. 1992) involved deputies in a county where the entire sheriff's department had very limited responsibility. Apparently, in the County of Cambria deputy sheriffs do nothing more than transport prisoners, provide court security, and act as process servers. *Burns*, 971 F.2d at 1022. Focusing on these limited responsibilities, the Court in *Burns* concluded that political loyalty was not an appropriate consideration for the job in question.

C. The Fifth And Tenth Circuits Have Adopted The Pickering Balancing Test.

Where a deputy campaigns against a sheriff, the Fifth Circuit has simply abandoned the *Elrod-Branti* principle altogether and adopted a pure *Pickering* balancing test. See, *McBee v. Jim Hogg County, Texas*, 730 F.2d 1009 (5th Cir. 1984) (en banc).

In a thoroughly confused opinion, the Tenth Circuit held the termination of a deputy who actually runs against the sheriff is analyzed under *Pickering*, whereas the termination of deputies who actively supported his campaign are analyzed under *Elrod/Branti* principles. See, *Jantzen v. Hawkins*, 188 F.3d 1247 (10th Cir. 1999). In holding the supporting deputies were not policymakers,

the Court followed reasoning similar to the Sixth Circuit. The Court focused on the day-to-day functions of a particular office in question, and concluded the two deputies were not "policymakers" because there was no indication that they "were such important communicators or were privy to confidential information to such an extent that political loyalty would be an appropriate job requirement." 188 F.3d at 1256.

D. The Ninth Circuit Opinion In This Case Sides Squarely With The Third And Sixth Circuits.

Turning to the Ninth Circuit opinion in the instant case, it is evident that the panel majority has staked out a position aligned with those courts who have generally found deputy sheriffs not to be "policymakers" subject to partisan dismissal. The Court held that deputy sheriffs are not "per se" policymakers. Rather than focus on the inherent powers of the deputy and the impact of the sheriff's ability to implement policy, the Ninth Circuit requires an analysis that focuses on "the duties actually performed" by the deputy in question. App. 17. The panel held those duties must be analyzed taking into account "several factors to consider in deciding whether political affiliation could be a job requirement: 'vague or broad responsibilities, relative pay, technical competence, power to control others, authority to speak in the name of policymakers, public perception, influence on programs, contact with elected officials, and responsiveness to partisan politics and political leaders'." App. at 11-12 quoting *Hall v. Ford*, 856 F.2d 255, 262 (D.C. Cir. 1988.)

The panel attempts to reconcile its opinion with the other circuits by attempting to recast *Terry*, *Upton* and

Jenkins as simply being the result of an analysis of specific job duties being performed by the individual deputies in each of those cases. App. 14-17. Yet, even on cursory inspection it is clear that the opinion in this case is simply not reconcilable with *Terry, Jenkins* or *Upton*. First, the Ninth Circuit's command that we focus directly on the actual job assignments given to the deputy in question is directly contrary to *Upton* where the Court stated that it must examine "the powers inherent in a given office, as opposed to the functions performed by a particular occupant of the office." *Upton, supra*, 930 F.2d at 1214. Moreover, there is no meaningful distinction between the inherent powers of a California deputy sheriff and the inherent powers of the deputies in *Jenkins, Upton* and *Terry*. Under California law, a deputy sheriff has the broadest and vaguest of responsibilities, "Both the general statutes and decisional law establish that [deputy sheriffs] possess all of the powers and may perform all of the duties attached by law to the office of sheriff." *People v. Woods*, 7 Cal.App.3d 382, 385 (1970); see also Cal. Gov. Code § 24100. Deputies are charged broadly with "preserving the peace." Cal. Gov. Code § 26600. Thus, as much as any other state, deputies in California act as the alter ego of the sheriff. If one were to follow the analysis laid down by *Jenkins, Terry* and *Upton*, the conclusion would be that a California deputy, particularly in a smaller county such as Tehama, would be subject to termination for having actively supported the sheriff's political opponent.

E. Certiorari Review Is Needed To Resolve These Widely Conflicting Authorities.

As was noted by the dissent in the instant case, Justice Powell had predicted the confusion following *Branti*, "The standard articulated by the court is framed in vague and sweeping language certain to create vast uncertainty. Elected and appointed officials at all levels . . . no longer will know when the political affiliation is an appropriate consideration in filling a position." App. 34 (O'Scannlain, dissenting) quoting *Branti, supra.* 445 U.S. at 524 (Powell, J., dissenting.) At least one commentator has noted that in the ten years following *Branti*, there have been numerous variations and conflicts among the federal circuits of their application of *Branti* to patronage cases. See, Martin, *A Decade of Branti Decisions: A Government Official's Guide to Patronage* 39 Am. U.L.Rev. 11 (1989). In light of the failure of the lower courts to develop a consistent set of principles concerning politically related dismissals in the context of deputy sheriffs, it is time for this Court to bring clarity to the issue.

II.

THE DECISION OF THE NINTH CIRCUIT WITH RESPECT TO QUALIFIED IMMUNITY IS SO INCONSISTENT WITH THE RELEVANT DECISIONS OF THIS COURT THAT IT WARRANTS REVIEW BY WRIT OF CERTIORARI.

Government officials performing discretionary functions generally are granted a qualified immunity such that they are "shielded from liability for civil damages

insofar as their conduct does not violate clearly established statutory or constitutional rights of which a reasonable person would have known." *Harlow v. Fitzgerald*, 457 U.S. 800, 818, 102 S.Ct. 2727, 73 L.Ed.2d 396 (1982). Qualified immunity protects, "all but the plainly incompetent or those who knowingly violate the law." *Malley v. Briggs*, 475 U.S. 335, 341, 106 S.Ct. 1092, 89 L.Ed.2d 271 (1986). Whether an official protected by qualified immunity may be held personally liable for allegedly unlawful action generally turns on the "objective reasonableness" of the action assessed in light of the rules that were "clearly established" at the time the action was taken. *Anderson v. Creighton*, 483 U.S. 635, 639, 107 S.Ct. 3034, 97 L.Ed.2d 523 (1987) citing *Harlow, supra*, at 819.

The operation of this standard "depends substantially upon the level of generality at which the relevant 'legal rule' is to be identified." *Anderson, supra*, 483 U.S. at 640. For example while the right to due process of law is quite clearly established "if the test of 'clearly established law' were to be applied at this level of generality, it would bear no relationship to the 'objective legal reasonableness' that is the touchstone of *Harlow*." *Anderson, supra*, 410 U.S. at 640. Instead, the constitutional principle in question must have been previously identified with such specificity that government officials can reasonably anticipate when their conduct may give rise to liability for damages. *Id.* This leads to the oft-quoted statement: "The contours of the right must be sufficiently clear that a reasonable official would understand that what he is doing violates that right." *Id.*

In this case, the panel majority opinion sweeps the *Anderson* principle aside. The panel held qualified immunity was not available because it was "clearly established" "that a non-policy making public employee in a sheriff's office is protected from retaliation for the exercise of First Amendment rights" and "It was thus clearly established, at the time defendants acted, that deputy sheriffs were not per se policymakers in California." App. 19-20. Simply stating that "non-policymaking" employees are protected is of virtually no use in determining whether a particular employee is subject to termination on a political basis. The word "policymaker" in this context is a term of art which itself connotes a difficult balance between competing constitutional and political values. For purposes of qualified immunity, the question is therefore not so much whether or not "non-policymaking" employees are subject to protection in some generic sense, but rather whether or not it is clearly established that the position in question is one in which political loyalty is a "reasonably appropriate" requirement.

Furthermore, the panel majority's formulation of what constitutes "clearly established law" is plainly wrong. The sweeping statement that all "non-policymaking" employees are "protected from retaliation for the exercise of First Amendment rights," is simply not true. Statements made in the work place touching purely on matters of private concern are not protected in the public employment context. *Connick v. Myers,* 461 U.S. 138, 146, 103 S.Ct. 1684, 75 L.Ed.2d 708 (1983). Likewise, even speech on matters of public concern may not protect the public employee under the *Pickering* balancing test.

Left alone, the majority opinion in this case can forever be cited as an example of a level of generality at which the law can be "clearly established" to defeat qualified immunity within the Ninth Circuit. Used as a model for future cases in the circuit, the majority opinion effectively eviscerates the qualified immunity as a meaningful defense in employee free speech claims. Allowing this state of affairs to exist within the nation's largest circuit is entirely unacceptable.

III.

THE RECOGNITION OF A CLAIM FOR UNCONSTITUTIONAL RETALIATIOIN BASED UPON DIRUZZA'S ACCEPTANCE OF A PLEA BARGAIN IS UNSUPPORTABLE AND IN CONFLICT WITH THE TENTH CIRCUIT.

There are two essential elements which a plaintiff must prove in order to state a claim under 42 U.S.C. § 1983: (1) that the conduct complained of was committed by a person acting under color of state law; and (2) that the conduct deprived the person of a right, privilege or immunity secured by the constitution or laws of the United States. *Parratt v. Taylor*, 451 U.S. 527, 535, 101 S.Ct. 1908, 68 L.Ed.2d 420 (1981). Here, the panel found the existence of a triable issue of fact as to whether such a deprivation occurred based upon nothing more than the following:

> The facts are disputed concerning the influence of defendants Heard and Floyd on the subsequent actions taken by the district attorney.

> Plaintiff relies upon declarations and depositions stating that defendants influenced the district attorney's decision to continue to pursue the case and to offer the plea bargain that resulted in DiRuzza's job loss, and that this influence was motivated by a desire to retaliate against DiRuzza for her political support of the incumbent sheriff.

App. 22.

In so holding, the Court recognized two entirely new theories of section 1983 liability. First, the Court finds that merely offering a plea bargain agreement can constitute a constitutional deprivation in the absence of evidence of prosecutorial misconduct. Second, the Court recognizes that a constitutional deprivation occurs merely because one government officer "influences" another government officer. Neither proposition can be left to stand.

Never before has a former criminal defendant been allowed to accept all the benefits of a plea bargain agreement, yet later seek to recover damages based upon one of the agreement's terms. The opposite is true. The Tenth Circuit was faced with a virtually identical issue in *Arnold v. McClain*, 926 F.2d 963 (10th Cir. 1991) and found no cause of action could be stated. In *Arnold*, a police officer had been informed by a local district attorney that criminal perjury charges would be filed against the officer unless he agreed to resign from the force. 926 F.2d at 964. *Id.* Just like the instant case, the officer accepted the plea and then turned around and filed a section 1983 lawsuit claiming his resignation in the face of the pending charges amounted to a constructive discharge in violation of his constitutional rights. *Id.* The Tenth Circuit rejected the theory, stating:

> We find the plaintiff voluntarily resigned, accepting the benefits of his 'bargain' with defendant by avoiding facing the criminal perjury charge, and cannot now claim this bargain amounted to a constructive discharge . . .

Id. at 966-967.

In the absence of direct evidence of prosecutorial misconduct or involuntariness, allowing a criminal defendant to claim a constitutional deprivation based upon the acceptance of a plea bargain simply defies common sense. It requires one to accept the notion that the Constitution prohibits a government officer from merely offering a plea bargain. This is because the last act of the alleged deprivation is the decision of the defendant to accept the deal. Also recognizing such claim for relief unnecessarily ties the hands of prosecutors and courts, because if government officials could be sued on the basis of nothing more than their motivation for offering a plea, prosecutors would certainly be reluctant to offer many plea bargains.

Equally troubling is the Ninth Circuit's finding that Heard and Floyd violated the Plaintiff's constitutional rights by seeking to "influence" a decision of a separate constitutional officer. In California, the prosecution of criminal offenses is the sole responsibility of the county district attorney who has the sole discretion to determine who to charge, what charges to file and pursue, and what punishment to seek. *People v. Ubanks*, 14 Cal.4th 580, 589 (1996); *Hicks v. Orange County Board of Supervisors*, 69 Cal.App.3d 228, 240 (1977). *Id.* citing *People Ex. Rel. Younger v. Superior Court*, 86 Cal.App.3d 180, 203 (1978)

As a consequence, the district attorney has the sole charging discretion as well as the discretion to enter into plea bargain agreements and may not be controlled by the courts, or local government officials. *Hicks, supra*, 69 Cal.App.3d at 240.

Therefore, since Heard and Floyd lacked the power to affect DiRuzza's plea bargain, the panel majority recognizes a cause of action based merely upon their "influence." By publishing the instant decision, the panel majority opinion is now citable for the proposition that there is such a thing as an unconstitutional "exercise of influence." Left to stand, the opinion would prove a truly fertile ground for new litigation.

IV.

CONCLUSION

This is a case that cries out for Supreme Court intervention. It is important for this Court to now resolve the clear split of authority that has arisen among the circuits as to the particular issue presented by this case. In resolving this split, for the first time since *Branti*, the Court could directly analyze the question when a particular government employee can be discharged on account of the employee's participation in election campaigns against his or her elected superior. As to the second two aspects to the Ninth Circuit's holding, this Court needs to intervene to simply prevent the panel majority's opinion from becoming a future citation for principles that are wholly unacceptable. For these reasons, Petitioners

respectfully request writ of certiorari be issued to the Ninth Circuit.

Respectfully submitted,

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FOR PUBLICATION

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

SHEROL DIRUZZA, aka Sherol Janc, *Plaintiff-Appellant,* v. COUNTY OF TEHAMA, a public entity; ROBERT HEARD, as an individual and as Sheriff for the County of Tehama; JERRY FLOYD, as an individual and as Undersheriff of the County of Tehama, *Defendants-Appellees.*	No. 98-15997 D.C. No. CV-96-00596-WBS OPINION

Appeal from the United States District Court
for the Eastern District of California
William B. Shubb, District Judge, Presiding

Argued and Submitted
July 12, 1999 – San Francisco, California

Filed March 21, 2000

Before: Stephen Reinhardt, Diarmuid F. O'Scannlain, and William A. Fletcher, Circuit Judges.

Opinion by Judge William A. Fletcher;
Dissent by Judge O'Scannlain

COUNSEL

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OPINION

W. FLETCHER, Circuit Judge:

Plaintiff Sherol DiRuzza was a deputy sheriff in Tehama County from 1992 to 1995. During the election season in 1994, she supported incumbent Sheriff Mike Blanusa in his bid for reelection. Blanusa lost to Sheriff Robert Heard, one of the defendants in this case. DiRuzza asserts that defendants Heard and Undersheriff Jerry Floyd caused her to lose her job as a result of her political activity in support of Blanusa.

The district court concluded that DiRuzza's political activities were not protected under the First Amendment because deputy sheriffs are policymakers, and that political loyalty is an appropriate requirement for her job. The district court accordingly held that defendants were allowed to retaliate against DiRuzza for her political speech. The district court granted summary judgment to

defendants Heard, Floyd and Tehama County, and DiRuzza has timely appealed.

We reverse the district court's grant of summary judgment. We hold that defendants have failed to show as a matter of law that DiRuzza was a policymaker and that political loyalty was therefore an appropriate requirement for her job. We remand for a determination of whether her actual duties were those of a policymaker. We further hold that the law protecting non-policymaking public employees from retaliation for the exercise of their First Amendment rights was clearly established in 1995, and we remand for a determination of the reasonableness of the actions of defendants Heard and Floyd in light of the then-clearly established law. Finally, we remand for further proceedings to determine, whether defendants Heard and Floyd engaged in political retaliation.

I

In November 1994, incumbent Tehama County Sheriff Mike Blanusa was defeated by defendant Sheriff Robert Heard. Heard assumed office as the new sheriff on January 3, 1995. DiRuzza had publicly supported Blanusa in the election, even appearing in a televised political advertisement on his behalf. Prior to Heard's assuming office, DiRuzza discharged her service revolver out of her bedroom window during a domestic dispute in which her fiance allegedly damaged her car, tore her phone off the wall, and threatened her with physical violence. As a result of this incident, Blanusa suspended DiRuzza for 30 days. On December 15, 1994, the district attorney charged

DiRuzza with the felony of "gross negligent discharge of a firearm" and the misdemeanor of "exhibiting a firearm in a rude and threatening manner." Cal. Penal Code §§ 246.3 and 417(a)(2). After Heard took office in January, DiRuzza was allowed to plead guilty to the lesser infraction of disturbing the peace, but only on condition that she resign her position as deputy sheriff.

On March 26, 1996, DiRuzza filed suit in federal district court, alleging twelve federal and state causes of action against Sheriff Heard, Undersheriff Floyd, and Tehama County. The gravamen of her complaint was that Heard and Floyd retaliated against her because she had supported Blanusa in the election. She alleged that, due to her political support of Blanusa and opposition to Heard, she was not re-sworn as a deputy after the election, was given undesirable shifts, and was forced to accept resignation under threat of a felony charge. By the time the district court ruled on defendants' motion for summary judgment, DiRuzza had narrowed her suit under federal law to claims under 42 U.S.C. §§ 1983 and 1985, and sought only damages as a remedy.

Defendants at first denied that there was any political retaliation against DiRuzza, contending, in the words of the district court, "that all the alleged adverse employment actions were due to the pending felony charge of negligent discharge of her service weapon." At summary judgment, defendants proposed as an undisputed material fact that neither Heard nor Floyd "knew of plaintiff's support for the former Sheriff Blanusa." DiRuzza disputed this assertion and defendants subsequently filed a supplemental brief arguing that irrespective of what

knowledge they had, there is no constitutional prohibition against an elected sheriff's termination of a deputy for partisan reasons.

In granting summary judgment for all defendants on DiRuzza's claims under §§ 1983 and 1985, the district court held, in essence, that deputy sheriffs in California are policymakers and may be fired for political reasons. In so holding, the district court relied upon three cases from other circuits holding that deputy sheriffs are policymakers. *See Jenkins v. Medford*, 119 F.3d 1156 (4th Cir. 1997) (en banc), *cert. denied*, 522 U.S. 1090 (1998); *Upton v. Thompson*, 930 F.2d 1209 (7th Cir. 1991); *Terry v. Cook*, 866 F.2d 373 (11th Cir. 1989). The district court supported its holding that DiRuzza was a policymaker and therefore subject to partisan dismissal by noting that under Cal. Gov't Code § 24100 a deputy sheriff exercises the same general authority as the sheriff. The district court further held, in the alternative, that individual defendants Heard and Floyd were entitled to qualified immunity because they had not violated a clearly established right. The district court then declined to exercise supplemental jurisdiction over the remaining state law claims.

We review *de novo* a grant of summary judgment. *Margolis v. Ryan*, 140 F.3d 850, 852 (9th Cir. 1998). Viewing the evidence in the light most favorable to the nonmoving party, we must determine whether the district court correctly applied the law and whether there are any genuine issues of material fact. *Id.*

II

A. Was Deputy Sheriff DiRuzza a Policymaker?

We must first decide whether DiRuzza could be fired because of her political activity. "Government officials may not discharge public employees for refusing to support a political party or its candidates, unless political affiliation is a reasonably appropriate requirement for the job in question." *O'Hare Truck Serv., Inc. v. City of Northlake*, 518 U.S. 712, 714 (1996) (*citing Elrod v. Burns*, 427 U.S. 347 (1976)); *Branti v. Finkel*, 445 U.S. 507 (1980). The key inquiry is whether DiRuzza held a policymaking position where political affiliation was a "reasonably appropriate requirement" for the job. *See O'Hare*, 518 U.S. at 719.

The Supreme Court has held repeatedly that public employees are protected from retaliation for the exercise of their First Amendment rights. "A state may not condition public employment on an employee's exercise of his or her First Amendment rights." *O'Hare*, 518 U.S. at 717. "The First Amendment prevents the government, *except in the most compelling circumstances*, from wielding its power to interfere with its employees' freedom to believe and associate." *Rutan v. Republican Party of Ill.*, 497 U.S. 62, 76 (1990) (emphasis added). However, an employee's rights are not absolute and must be balanced against the role of government as an employer. *See Pickering v. Board of Educ.*, 391 U.S. 563, 568 (1968) (finding that the court must "balance . . . the interests of the [employee], as a citizen, in commenting on matters of public concern and the interest of the state, as an employer, in promoting the efficiency of the public services it performs through its employees").

Recognizing that there are some circumstances in which an employee's First Amendment rights are not absolute, the Supreme Court has carved out a narrow exception to the First Amendment's protection in cases where the public employee is a policymaker or confidential employee. This exception was first enunciated in 1976 in *Elrod v. Burns*, where four non-civil service employees of a sheriff's department were fired by the new sheriff because they failed to affiliate themselves with the party of newly elected Sheriff Elrod. One employee was the Chief Deputy of the Process Division, another a bailiff, and the third a process server; the position of the fourth employee was not described. *Elrod*, 427 U.S. at 350-51. The Supreme Court held that these patronage dismissals were unconstitutional. Justice Brennan's plurality opinion broadly condemned the constitutional evils of the patronage system, but recognized an exception for "policymaking positions" where "the employee acts as an adviser or formulates plans for the implementation of broad goals." *Elrod*, 427 U.S. at 367-68. Justice Stewart concurred separately, joined by Justice Blackmun, stating, "The single substantive question involved in this case is whether a non-policymaking, non-confidential government employee can be discharged or threatened with discharge from a job that he is satisfactorily performing upon the sole ground of his political beliefs. I agree with the plurality that he cannot." *Id.* at 374-75 (Stewart, J., concurring).

The policymaking exception articulated in *Elrod* was refined in 1980 in *Branti v. Finkel*, in which a newly appointed Democratic public defender gave notices of termination to Republican assistant public defenders in

the office. The Court held that the terminations were unconstitutional because an assistant public defender does not occupy a position where "party affiliation is an appropriate requirement for the effective performance of the public office." *Branti*, 445 U.S. at 518. Rather, "[t]he primary, if not the only, responsibility of an assistant public defender is to represent individual citizens in controversy with the State," and "whatever policymaking occurs in the public defender's office must relate to the needs of individual clients and not to any partisan political interests." *Id.* at 519. However, the Court was careful to withhold judgment on district attorneys, who exercise "broader public responsibilities." *Id.* at 519 n.13. Indeed in *Fazio v. City and County of San Francisco*, 125 F.3d 1328 (9th Cir. 1997), implementing *Elrod* and *Branti*, this court has held that certain deputy district attorneys are policymakers who may be terminated for partisan reasons.

In holding that a California deputy sheriff is a policymaker, the district court relied on two out-of-circuit cases that upheld dismissals of 42 U.S.C. § 1983 actions by deputy sheriffs on the ground that they were policymakers, *Jenkins*, 119 F.3d at 1156; *Terry*, 866 F.2d at 373, and a third out-of-circuit case that upheld qualified immunity on the ground that "deputy sheriffs operate with a sufficient level of autonomy and discretionary authority to justify a sheriff's use of political considerations when determining who will serve as deputies," *Upton*, 930 F.2d at 1218. These three cases held that deputy sheriffs in North Carolina (*Jenkins*), Alabama (*Terry*),

and Illinois (*Upton*) are policymakers subject to termination for partisan reasons.[1] We are willing to assume arguendo that these holdings are correct, based on the different nature of the job performed by deputy sheriffs in these circuits and these states. However, we do not believe that a per se rule concerning deputy sheriffs is appropriate in this circuit and, in particular, in California.

Under California law, a county sheriff may appoint his or her "deputies." Cal. Gov't Code § 24101. All peace officers employed in the county sheriff's office, at whatever level, are sheriff's deputies. *See generally People v. Otto*, 77 Cal. 45 (1888). Among the deputies are higher-level employees such as the undersheriff, lieutenant, sergeant and captain as well as lower-level employees such as line peace officers and jail custodians. The title "deputy sheriff" or "sheriff's deputy" is thus not a clear job category with consistent responsibilities in California. Any categorization based upon job title alone obscures rather than clarifies the nature of the duties actually performed and the constitutional rights at issue. We find instructive the analysis in *Board of County Commissioners v. Umbehr*, 518 U.S. 668 (1996), in which the Supreme Court rejected a simplified, label-based approach in a case involving First Amendment rights of government

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[1] Although the Seventh Circuit has held that a deputy sheriff may be terminated for political reasons, a deputy may not be retained and then subjected to a campaign of retaliatory harassment. *See Wallace v. Benware*, 67 F.3d 655, 664 (7th Cir. 1995). In *Wallace*, the campaign of harassment was severe, including actions at the scene of a crime that threatened the plaintiff's life. *Id.* at 658.

contractors. The Court held that a categorical rule denying independent contractors protection for the exercise of their First Amendment rights "would leave First Amendment rights unduly dependent on whether state law labels a government service provider's contract as a contract of employment or a contract for services, a distinction which is at best a very poor proxy for the interests at stake." *Id.* at 678-79; *see also O'Hare*, 518 U.S. at 721-22. Given the range of duties performed by deputy sheriffs in California, a conclusion that deputy sheriffs are per se policymakers is inconsistent with important First Amendment rights as well as the analysis the Supreme Court requires under *Elrod* and *Branti*.[2]

Defendants assert that DiRuzza occupied a policymaking position because she gave open political support to the incumbent sheriff. We disagree. Political and free speech activities alone cannot make an employee a policymaker. If this were so, any employee entering the political arena to oppose re-election of the head of her office would become a policymaker and would thus be subject to retaliation. That is, the very act of engaging in political debate would result in the forfeiture of an

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[2] This case does not involve the other line of analysis set forth in *Pickering* and *Connick*, where speech on matters of public concern must be evaluated in terms of the effect on the government's efficient management of its operations. *See Pickering*, 391 U.S. 563 (1968); *Connick v. Myers*, 461 U.S. 138 (1983). Defendants do not assert that DiRuzza's speech and political activities had an effect on the working relationships in the office or on the efficient operation of the sheriff's department that would justify limiting her First Amendment rights.

employee's First Amendment rights. Defendants further assert that a deputy sheriff may act as a policymaker. That is true but beside the point. The actual, not the possible, duties of an individual employee determine whether political loyalty is appropriate for the effective performance of her job.

In *Thomas v. Carpenter*, 881 F.2d 828 (9th Cir. 1989), a sheriff's lieutenant who had run unsuccessfully against the incumbent sheriff brought a retaliation suit similar to DiRuzza's. Although the lieutenant had not been terminated, he alleged that he had been excluded "from attending departmental staff meetings, from attending policy manual revision meetings, and from participating as an evaluator for the department's high risk entry team." *Id.* at 829. This court reversed a dismissal under Fed. R. Civ. P. 12(b)(6), holding that

> [defendant] cannot show, based solely on the allegations of [the] complaint, that [plaintiff's] loyalty is essential to the effective performance of the tasks removed from his list of responsibilities. . . . [Defendant] may be able to prove at trial, or perhaps even by summary judgment, that [plaintiff's] political loyalty in each of these positions is needed for the effective implementation of general departmental policy.

Id. at 832. The clear import of *Thomas* is that there is no per se rule in this circuit based solely on job title. The critical inquiry is the job actually performed.

Quoting *Hall v. Ford*, 856 F.2d 255, 262 (D.C. Cir. 1988), this court outlined, in *Fazio v. City and County of San Francisco*, 125 F.3d 1328, 1334 n.5 (9th Cir. 1997), several factors to consider in deciding whether political

affiliation could be a job requirement: " 'vague or broad responsibilities, relative pay, technical competence, power to control others, authority to speak in the name of policymakers, public perception, influence on programs, contact with elected officials, and responsiveness to partisan politics and political leaders.' " Based on these factors and looking at the job actually performed, we held that Fazio, a high-ranking Assistant District Attorney for the City and County of San Francisco, was a policymaker subject to partisan dismissal. "While [Fazio's] powers are identical to those of a rank-and-file Assistant District Attorney, they are also nearly identical to those of the actual District Attorney. . . . Moreover, Fazio was paid over $100,000 per year, commented to the media about [City and County of San Francisco] cases and other cases of general public interest, and handled high profile cases with a great degree of autonomy." *Id.* at 1334.

Under the factors articulated in *Hall* and repeated in *Fazio*, the defendants are not entitled to summary judgment because there are material facts in dispute regarding whether DiRuzza was a policymaker subject to partisan dismissal. The Tehama County Sheriff's Department employs 78 deputy sheriffs. All of them are covered under an extensive Memorandum of Understanding between the union and the county.[3] Deputy sheriffs appear to be the lowest ranking peace officers in the

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[3] We take judicial notice the Memorandum of Understanding entered into between the County of Tehama and the Tehama County Law Enforcement Officers Bargaining Unit pursuant to Federal Rule of Evidence 201 and *Papai v. Harbor Tug and Barge Co.*, 67 F.3d 203, 211 fn.5 (9th Cir. 1995), *rev'd on other grounds*, 540 U.S. 548 (1997).

department; in the Memorandum of Understanding, they are listed above secretaries and below other categories of employees such as sergeants and sheriff's detective investigators. DiRuzza asserts that she worked in positions associated with the jails during much of her time with the sheriff's department. A deputy sheriff in California who works in a custodial position in a jail is responsible for the custody, care, supervision, security, movement, and transportation of inmates, and is limited to her prescribed custodial duties. Cal. Penal Code § 830.1. According to DiRuzza and other department employees, DiRuzza spent three months assisting a lieutenant in a suit involving conditions at the jails and spent six months assigned to a jail construction project as an assistant to a sergeant. While working with the construction project, DiRuzza drafted a "policy manual" for the new jail. According to testimony of DiRuzza's superior, the drafting consisted of revising an old manual of jail procedures, such as procedures for handling inmates' mail, in order to comply with court-ordered requirements.

Under *Elrod*, *Branti*, and *Fazio*, there are sufficient material facts to foreclose summary judgment for defendants. Indeed, on the current state of the record, there is little to support a conclusion that DiRuzza is a policymaker. On remand, defendants have the burden of showing that DiRuzza was a policymaker and thus vulnerable to politically-based discharge. In determining whether DiRuzza was a policymaker, the district court should direct its attention to the factors outlined in *Fazio*, including but not limited to whether DiRuzza had vague or broad responsibilities, whether she was paid an unusually high salary, whether she had the power to control

others or the authority to speak in the name of the department, whether the public perceived that she had such authority, and whether she created or substantially influenced the policy of the sheriff's department.

Our holding is clearly consistent with the law in three other circuits. The Third Circuit has held that political affiliation is not an appropriate job requirement for deputy sheriffs whose primary tasks are service of process, transport of prisoners, and courtroom security. *Burns v. County of Cambria*, 971 F.2d 1015, 1022 (3rd Cir. 1992). That court rejected any consideration of the size of the sheriff's department and stated that, "[a]lthough loyalty and confidentiality of sheriff's deputies are desirable attributes, those traits are needed for many working relationships. It has never been suggested that the need for loyalty and confidentiality alone supports politically motivated dismissals independent of the tasks which the employee must perform." *Id.* at 1023. Further, the Sixth Circuit, on facts very similar to those in our case, has held that a rank-and-file deputy sheriff was not subject to patronage dismissal:

> [The] defendant has failed to show that political affiliation is "an appropriate requirement for the effective performance" of [the position of deputy sheriff]. The record does not show that [the] deputy sheriffs had the types of specific duties or responsibilities, or the amount of discretion or policymaking authority, that would make political affiliation an appropriate requirement for employment.

Hall v. Tollett, 128 F.3d 418, 429 (6th Cir. 1997). Finally, the Tenth Circuit has held that two non-sworn sheriff's

department employees, one the head jailer and the other an administrative assistant, could not be terminated because of political affiliation. *Dickeson v. Quarberg*, 844 F.2d 1435, 1443-44 (10th Cir. 1988).

We believe that our holding is also consistent with the law of the three circuits whose cases were relied upon by the district court. In those cases, the courts of appeals held that deputy sheriffs were policymakers subject to partisan dismissal; but in each case the courts' holdings were based not simply on the job title of "deputy sheriff," but rather on an analysis of the actual job performed under that title in the states at issue. In *Jenkins v. Medford*, 119 F.3d 1156 (4th Cir. 1997), the Fourth Circuit upheld the partisan firings of several deputy sheriffs in North Carolina. After noting that the Supreme Court had created a "narrow exception" to the otherwise applicable constitutional protection of government employees from partisan dismissal, thereby allowing patronage dismissals of those in "policymaking positions," *id.* at 1161, the court went on to analyze the position of deputy sheriff in North Carolina:

> [W]e now consider the specific political and social roles of sheriffs and their deputies in North Carolina. . . . The North Carolina legislature has also recognized the special status of sheriff's deputies in the eyes of the law: "The deputy sheriff has been held by the Supreme Court of this State to hold an office of special trust and confidence, acting in the name of and with powers coterminous with his principal, the elected sheriff." The sheriff may not delegate final responsibility for his official duties, but he may appoint deputies to assist him. Our circuit

> and North Carolina state courts agree that the sheriff can be held liable for the misbehavior of his deputies. Presumably it is for these reasons that the legislature has made deputies at-will employees who "shall serve at the pleasure of the appointing officer."

Id. at 1163-64. The court specifically limited its holding, noting that "courts examine the job duties of the position, and not merely the title, of those dismissed." *Id.* at 1165.

In *Upton v. Thompson*, 930 F.2d 1209 (7th Cir. 1991), the Seventh Circuit upheld partisan firings of deputy sheriffs in Illinois. After recognizing that under Supreme Court law only employees holding policymaking positions could be fired for partisan reasons, *id.* at 1213, the court analyzed the actual nature of the job performed by deputy sheriffs in Illinois and concluded that deputy sheriffs were policymakers. Among other things, the court specifically noted that "[a] deputy sheriff in implementing the Sheriff's basic policy, will 'make some decisions that will actually create policy.' " *Id.* at 1215 (quoting *Livas v. Petka*, 711 F.2d 798, 801 (7th Cir. 1983)).

Finally, in *Terry v. Cook*, 866 F.2d 373 (11th Cir. 1989), the Eleventh Circuit upheld the partisan firing of deputy sheriffs in Alabama. The court applied the *Elrod-Branti* test of whether "political loyalty is an appropriate requirement for employment," and analyzed the nature of the job of deputy sheriff in Alabama in upholding a Rule 12(b)(6) dismissal of claims brought by deputy sheriffs who had been fired:

> Under Alabama law, a deputy sheriff is the general agent of and empowered to enter into business transactions for the sheriff. Any transaction

> within the scope of the sheriff's duties may be acted upon by his deputy. The deputy sheriff is the alter ego of the sheriff, and the sheriff is civilly liable for actions committed by a deputy in the performance of his duty. . . . The closeness and cooperation required between sheriffs and their deputies necessitates the sheriff's absolute authority over their appointment and/or retention.

Id. at 377 (citations omitted). Significantly, the court in *Terry* reversed a Rule 12(b)(6) dismissal of claims brought by other employees, including "jailers," for the same partisan firing:

> It has not been established that loyalty to an individual sheriff is an appropriate requirement for effective job performance for the remaining positions of clerk, investigator, dispatcher, jailer, and process server. This is a determination that depends upon the actual responsibilities of each position and the relationship of each to the sheriff.

Id. at 377-78.

The district court thus erred in granting summary judgment based on a holding that deputy sheriffs in California are policymakers and may be fired for the exercise of their first amendment rights. While it is possible that some deputy sheriffs in California may be policymakers, an analysis of an individual deputy's actual duties is necessary to that determination. On the record before us, there are material facts in dispute regarding the duties actually performed by DiRuzza and whether these duties made her a policymaker. We therefore remand for an individualized determination of whether DiRuzza was

a policymaker for whom political affiliation was a reasonable requirement.

B. Qualified Immunity

Defendants Heard and Floyd contend that even if DiRuzza was protected against retaliation, they are nonetheless entitled to qualified immunity insulating them from damage judgments. Government officials who perform discretionary functions are entitled to qualified immunity only "insofar as their conduct does not violate clearly established statutory or constitutional rights of which a reasonable person would have known." *Harlow v. Fitzgerald*, 457 U.S. 800, 818 (1982). This test necessitates a two-part analysis: "(1) whether the law governing the official's conduct was clearly established, and (2) whether, given this clearly established standard, a reasonable official could believe that his or her conduct was lawful." *Biggs v. Best, Best & Krieger*, 189 F.3d 989 (9th Cir. 1999); *see also Ortega v. O'Connor*, 146 F.3d 1149, 1154 (9th Cir. 1998). A decision regarding qualified immunity is reviewed *de novo*. *Romero v. Kitsap County*, 931 F.2d 624, 627 (9th Cir. 1991). While the plaintiff bears the burden of proof regarding whether the right is clearly established, a defendant must prove that his or her conduct was reasonable. *Id.*

For purposes of determining qualified immunity, the law must be clearly established at the time of the defendant's acts. In this case, the alleged retaliation occurred in 1995. The test for determining whether a law is clearly established "requires more than an alleged violation of

extremely abstract rights." *Tribble v. Gardner*, 860 F.2d 321, 324 (9th Cir. 1988) (citations omitted).

> The contours of the right must be sufficiently clear that a reasonable official would understand that what he is doing violates that right. This is not to say that an official action is protected by qualified immunity unless the very action in question has previously been held unlawful, but it is to say that in the light of pre-existing law the unlawfulness must be apparent.

Anderson v. Creighton, 483 U.S. 635, 640 (1987) (citations omitted).

Under *Elrod* and *Branti*, decided by the Supreme Court in 1976 and 1980, and under Ninth Circuit case law decided prior to 1995, it was clearly established that a non-policymaking public employee in a sheriff's office is protected from retaliation for the exercise of First Amendment rights. While neither the Supreme Court nor this court has previously ruled on deputy sheriffs in Tehama County, such a ruling is not necessary. *Elrod*, the initial Supreme Court decision creating the policymaking exception, involved a sheriff's department. The Court, in defining the right of certain employees to be free from retaliation for the exercise of First Amendment expression in that case, stated that "the nature of the responsibilities is critical." *Elrod*, 427 U.S. at 367. The Supreme Court in Branti went on to clarify that the proper inquiry is "whether the hiring authority can demonstrate that party affiliation is an appropriate requirement for the effective performance of the public office involved." *Branti*, 445 U.S. at 518. In 1989, this court in Thomas held that a lieutenant in a sheriff's office was not necessarily a

policymaker, *see* 881 F.2d at 832, and that the defendant had failed to show that "political loyalty is essential to the effective performance of the tasks removed from his list of responsibilities." *Id.*

It was thus clearly established, at the time defendants acted, that deputy sheriffs were not per se policymakers in California.[4] It was clearly established, as a matter of law, that the actual duties performed by a deputy sheriff determined whether he or she was a policymaker and therefore subject to partisan dismissal, or a non-policymaker and therefore protected from such dismissal. The record made so far in this case does not make clear whether DiRuzza's job actually entailed policymaking and, thus, whether she could be fired for partisan reasons. This lack of clarity, however, does not support Floyd's and Heard's claim of qualified immunity. The fact that the specifics of DiRuzza's job duties are unclear to the court on the current state of the record, does not mean that Heard and Floyd did not know those specifics at the time they acted.

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[4] The dissent contends that the right of a non-policymaking public employee to be free from retaliation was not clearly established in 1995, the date of the actions at issue in this case, because *Fazio v. City and County of San Francisco* was decided by this circuit in 1997. This would be a telling point if *Fazio* had broken new ground. *Fazio*, however, was an obvious application of an already-established rule. *Elrod* and *Branti*, decided by the Supreme Court in 1976, and 1980, and *Thomas*, decided by this circuit in 1989, all clearly held that non-policymaking employees are protected from retaliatory discharge based on the exercise of First Amendment rights.

For purposes of summary judgment on the question of qualified immunity, as well as on all other issues, we must presume the facts to be those most favorable to the non-moving party. *See Liston v. County of Riverside,* 120 F.3d 965, 977 (9th Cir. 1997). Accepting DiRuzza's view of the facts as correct and drawing all reasonable inferences in her favor, she was not a policymaker, and that fact would have been well known to both Heard and Floyd. We need not speculate here on the merits of the qualified immunity argument under the facts that might be developed at trial.

C. Retaliation

The district court did not reach the question whether defendants Heard and Floyd retaliated against DiRuzza for the exercise of her First Amendment rights. Defendants claim that their acts were motivated not by her political expression but, rather, by her unlawful discharge of a firearm. While we may affirm a grant of summary judgment on grounds other than those relied upon by the district court, *Gemtel Corp. v. Community Redevelopment Agency of the City of Los Angeles,* 23 F.3d 1542, 1546 (9th Cir. 1994), we decline to do so here because there are disputed facts material to the question of retaliation that preclude summary judgment. In *Mount Healthy City Sch. Dist. Bd. of Educ. v. Doyle,* 429 U.S. 274 (1977), the Supreme Court articulated the standard for determining when retaliation for protected First Amendment conduct is an impermissible factor in a decision to take adverse action. The burden initially rests on the plaintiff to show that the conduct at issue was a motivating factor in the

defendant's action. The burden then shifts to the defendant to show by a preponderance of the evidence that "it would have reached the same decision . . . even in the absence of the protected conduct." *Id.* at 287.

In our case, there are disputed material facts regarding whether defendants took adverse job action against DiRuzza and whether political retaliation was a substantial or motivating factor. DiRuzza was involved in a violent disagreement with her fiance and fired eight rounds from her service revolver out her bedroom window. DiRuzza explains the incident by saying that her fiance was threatening her with a rifle and that she was attempting to get the neighbors to call the authorities. The matter was submitted to the district attorney, and it is undisputed that DiRuzza was suspended for thirty days under then-Sheriff Blanusa. However, the facts are disputed concerning the influence of defendants Heard and Floyd on the subsequent actions taken by the district attorney. Plaintiff relies upon declarations and depositions stating that defendants influenced the district attorney's decision to continue to pursue the case and to offer the plea bargain that resulted in DiRuzza's job loss, and that this influence was motivated by a desire to retaliate against DiRuzza for her political support of the incumbent Sheriff. Parker Decl. 3:24 to 4:2; Groves Dep., 23:14 to 28; Welsh Decl. ¶ 3-5. We believe that this evidence is enough to foreclose a grant of summary judgment for defendants. *See Soranno's Gasco, Inc. v. Morgan*, 874 F.2d 1310 (9th Cir. 1989) (liability depended upon the defendant's motivation, which was a genuine issue of material fact precluding summary judgment); *Allen v. Scribner*, 812 F.2d 426 (9th Cir. 1987) (two affidavits of co-workers sufficient

evidence to indicate that the protected expression was a substantial factor in the disciplinary action, thus precluding summary judgment); *Gilbrook v. City of Westminster*, 177 F.3d 839, 855 (9th Cir. 1999) (*Mt. Healthy* analysis is an intensely factual determination of motivation and causation).

III

We hold that the district court erred in finding categorically that deputy sheriffs in California are policymakers and reverse the grant of summary judgment to defendants Heard, Floyd, and Tehama County. We further hold that the district court erred in granting summary judgment to defendants Heard and Floyd on grounds of qualified immunity. Finally, we hold that there are material facts in dispute regarding Heard's and Floyd's alleged retaliation against plaintiff.

Because the district court found no constitutional injury to DiRuzza, it granted summary judgment to defendant Tehama County without reaching questions of liability specific to the county. We leave it to the district court to address such questions, as appropriate, on remand. Further, after dismissing DiRuzza's federal claims, the district court declined to exercise supplemental jurisdiction over her state claims under 28 U.S.C. § 1367(c). We leave it to the district court to reinstate and decide those claims, as appropriate, on remand.

We therefore **REVERSE** the summary judgment granted to defendants and **REMAND** for further proceedings consistent with this opinion.

O'SCANNLAIN, Circuit Judge, dissenting:

Today, the court holds a sheriff and an undersheriff responsible, ex post facto, for legal rules that did not exist at the time they acted. Because it would be wrong to hold these law enforcement officers to standards which the court's analysis reveals it cannot meet itself, I respectfully dissent.

I

A sheriff's office "would be unmanageable if its head had to . . . retain his political enemies . . . in positions of confidence or positions in which they would be . . . exercising discretion in the implementation of policy." *Fazio v. City and County of San Francisco*, 125 F.3d 1328, 1333 (9th Cir. 1997) (quotations omitted). Thus judges must be careful before interpreting the Constitution to place such a heavy burden on public employers. I agree with the court that in this circuit deputy sheriffs are not per se policymakers. I agree that the inquiry must be fact-specific. But I cannot agree with the court's misreading of the case law, a misreading that threatens to place heavy burdens on public officials forced to implement, through politically disloyal employees, policies the public elected them to enact.

We simply do not have sufficient information in the record to determine whether DiRuzza was a policymaker who could be fired after publicly campaigning for the sheriff's electoral rival. The district court did not inquire

into this because it relied on out-of-circuit cases to conclude that deputy sheriffs are per se policymakers. Moreover, DiRuzza has presented little evidence of her job responsibilities under Sheriff Blanusa, describing instead her limited responsibilities after Sheriff Heard took over. Thus, were I not to conclude that the defendants are qualifiedly immune, I would simply remand the case to the district court so that it could determine whether DiRuzza's authority and responsibilities made her a policymaker. With the utmost respect, but because the court, in my view, mischaracterizes the facts and the applicable law, I must dissent to its analysis. I would affirm the district court's holding that Sheriff Heard and Undersheriff Floyd were entitled to qualified immunity.

II

I agree with the court that *Thomas v. Carpenter*, 881 F.2d 828 (9th Cir. 1989), precludes any per se rule that deputy sheriffs are policymakers and that we must proceed to the analysis we laid out in *Fazio*. 125 F.3d at 1334 n.5.[1] To determine, then, whether political loyalty is a reasonably appropriate requirement for an employee in

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[1] I use the term "policymaker" only as shorthand for a position in which political loyalty may reasonably be required. I am mindful of the Supreme Court's instruction that "the ultimate inquiry is not whether the label 'policymaker' or 'confidential' fits a particular position; rather, the question is whether the hiring authority can demonstrate that party affiliation is an appropriate requirement for the effective performance of the public office involved." *Branti*, 445 U.S. at 518.

DiRuzza's position we consider her responsibilities, relative pay, technical competence, power to control others, authority to speak in the name of policy makers, public perception, influence on programs, contact with elected officials, and responsiveness to partisan politics and political leaders. *See id.* We should do so mindful of the admonition in *Fazio* that "a public employee need not literally make policy in order to fit within the *Elrod* policymaker exception." *Id.* at 1332.

First, the position of deputy sheriff has the broadest and vaguest of responsibilities. Under California law, "both the general statutes and decisional law establish that [deputy sheriffs] possess[ ] all of the powers and may perform all of the duties attached by law to the office of sheriff." *People v. Woods*, 7 Cal. App. 3d 382, 385 (1970); *see also* Cal. Gov't Code § 24100. As such they are charged broadly with "preserv[ing] peace." *See* Cal. Gov't Code § 26600. DiRuzza need not regularly exercise these powers in order to qualify as a policymaker. *See Fazio*, 125 F.3d at 1333 (citing *Mummau v. Ranck*, 687 F.2d 9 (3d Cir. 1982) (holding that an assistant district attorney (ADA) who only prosecuted juvenile cases and was not involved in the policymaking details of the office was a policymaker because regardless of whether the ADAs actually exercised all their powers, the powers granted to ADAs were broad)). "So long as the applicable statute, regulations and case law contemplate that the public officer might be relied upon to . . . implement[ ] policy the official may be fired for political reasons without offending the First Amendment." *Id.* (quotations omitted); *see also Dickeson v. Quarberg*, 844 F.2d 1435, 1442 (10th Cir. 1988) ("We focus on the inherent powers of the positions

as well as on the actual duties performed"). As a deputy sheriff, DiRuzza potentially enjoyed broad power, but the record does not contain sufficient information regarding her specific responsibilities to allow us to determine the duties she actually performed.

Second, DiRuzza's technical competence appears to be quite high. She has been chosen at least twice for extensive assignments relating to prison policy. The majority leaps from the fact that she has worked in positions associated with the jails to the conclusion that she worked in a "custodial position" in which her duties were limited to the care of prisoners. Supra at 3274. But the record reveals that DiRuzza's responsibilities were far more expansive. She first worked on a "Federal litigation project" assisting at depositions and at trial. Later, the sheriff appointed her as the number two deputy on the jail construction project, charging her with revising the policy manual for prison procedures. The majority's dismissive account of her responsibilities in this role betrays its own deaf ear to precedent instructing us that a policy maker need not literally make policy. *See Fazio*, 125 F.3d at 1332. DiRuzza was chosen for this second position precisely because of the technical competence and expertise she had acquired while working on the federal prison litigation. Determined not to allow a repetition of the poor policies and procedures which had led to the federal litigation, Sheriff Blanusa put DiRuzza in charge of drafting a new policy manual which would ensure that the prison complied with all of the pertinent laws.

Third, DiRuzza had extensive contact with and had to be responsive to elected officials, most obviously the elected sheriff, to whom she answered directly. As deputy

sheriff, DiRuzza was responsible for implementing the policies of this elected official. While working, "sheriff's deputies are often called upon to make on-the-spot split-second decisions effectuating the objectives and law enforcement policies which a particular sheriff has chosen to pursue." *McBee v. Jim Hogg County*, 703 F.2d 834, 839 (5th Cir. 1983), *vacated on other grounds*, 730 F.2d 1009 (5th Cir. 1984) (en banc). In rural Tehama County a deputy sheriff has wide latitude and discretion in implementing the sheriff's policies while on patrol. In fact her authority and responsibilities continued even when she was not on duty. *See Melendez v. City of Los Angeles*, 63 Cal. App. 4th 1, 8-9 (1998). While the sheriff generally is responsible for developing policy, DiRuzza "may, in carrying out [her] duties, make some decisions that will actually create policy." *Fazio*, 125 F.3d at 1332 (quotations omitted).

Fourth, the public would reasonably perceive that the uniformed deputy sheriff speaks for the sheriff. "In order to promote public confidence in law enforcement, the Sheriff depends on his deputies to publicly project his competence and the competence of the office." *Upton v. Thompson*, 930 F.2d 1209, 1215 (7th Cir. 1991). In the prison and on the beat she was the face and voice of the sheriff and his policies.

Thus, on remand, and with the benefit of more evidence, the district court may well conclude that DiRuzza's responsibilities in her position of deputy sheriff indicate the need for her political loyalty " 'not to the end that effectiveness and efficiency be insured, but to the end that representative government not be undercut by tactics obstructing the implementation of policies of

the new administration, policies presumably sanctioned by the electorate.' " *Thomas*, 881 F.2d at 831 (quoting *Elrod*, 427 U.S. at 367). Fewer acts convey greater opposition to an elected supervisor's policies than actively campaigning for a rival candidate.[2] Unlike the plaintiffs in *Elrod* and *Branti*, DiRuzza does not allege that Sheriff Heard retaliated against her merely for belonging to the wrong political party.[3] The court's misapplication of the law and its characterization of the facts would force a sheriff to implement his policies through, and to entrust the enforcement of his programs, to a policymaking deputy who actively campaigned against these policies and programs by appearing in television commercials for his opponent.

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[2] "We can think of no clearer way for a deputy to demonstrate opposition to a candidate for sheriff, and thus actual or potential disloyalty once the candidate takes office, than to actively campaign against the candidate's opponent." *Jenkins v. Medford*, 119 F.3d 1156, 1164-65 (4th Cir. 1997) (en banc); *cf. Wilbur v. Mahan*, 3 F.3d 214, 218 (7th Cir. 1993) ("The declaration of candidacy in these circumstances is a declaration of war."); *Upton*, 930 F.2d at 1218 ("This contrasts sharply with the politically active deputy who, by vociferously campaigning for the loser, encounters Matthew 26:52: 'All they that take the sword shall perish with the sword.' ")

[3] " 'If a public official is permitted to fire a confidential or policymaking employee merely because the latter quietly, inoffensively, undemonstratively belongs to the wrong political party . . . the official should be permitted to fire the same employee when the latter asks the electorate to the throw the rascal out. . . . ' " *Fazio*, 125 F.3d at 1332 (quoting, *Wilbur*, 3 F.3d at 218).

III

More troubling, the court holds that Sheriff Heard and Undersheriff Floyd cannot benefit from qualified immunity because they violated Deputy Sheriff DiRuzza's clearly established rights. Despite the fact that the Supreme Court's reasoning in this area has shifted, that the circuits are split on the question, and that the four Article III judges who have examined the very question in this case are equally divided on whether the First Amendment protects DiRuzza's disloyalty, the court concludes that the Sheriff and Undersheriff could have known in 1995 that DiRuzza had a clearly established right not to be fired under these circumstances.

Even if Sheriff Heard and Undersheriff Floyd improperly fired DiRuzza for her support of then-Sheriff Blanusa, they may only be held liable if, at the time they acted, the "law governing [their] conduct was clearly established" and if "given this clearly established standard, a reasonable official could believe that his or her conduct was lawful." *Biggs v. Best, Best & Krieger*, 189 F.3d 989, 994 (9th Cir. 1999) (citation omitted). "A right is 'clearly established' if 'the contours of [that] right [are] sufficiently clear that a reasonable official would understand that what he is doing violates that right.' " *B.C. v. Plumas Unified School District*, 192 F.3d 1260, 1268 (9th Cir. 1999) (quoting *Anderson v. Creighton*, 483 U.S. 635, 640 (1987)). "To show that the right in question here was clearly established, [DiRuzza] need not establish that [Heard's and Floyd's] behavior had been previously declared unconstitutional, only that the unlawfulness was apparent in light of preexisting law." *Id.* (quotations and citations omitted).

The question then is whether "the contours of [DiRuzza's] right were sufficiently clear" when Sheriff Heard and Undersheriff Floyd acted in 1995 that "a reasonable official would [have understood] that what he [was] doing violate[d] that right." *Id.* No one could disagree that by 1995, the time the defendants acted, it was clearly established that a non-policymaking public employee is protected from political retaliation. But this begs the question. Rather, we must ask whether the defendants could have known that a deputy sheriff with DiRuzza's job responsibilities was a non-policymaking employee. The district court got it right: they could not have.

Recall that, *Thomas*, decided in 1989, held that political loyalty is not necessarily a job requirement in a sheriff's office. This case, however, was decided on a motion to dismiss and the court explicitly left open the possibility that a defendant could establish at the summary judgment stage that loyalty is necessary for the position. *Thomas*, therefore, cannot stand for the proposition that it was clearly established that a deputy sheriff with DiRuzza's responsibilities was not a policymaker. Because *Thomas* does not clearly establish that DiRuzza *was* a policymaker, it cannot be said that this rule was clearly established at the time the defendants acted. After *Thomas*, and before 1995, there simply were no other Ninth Circuit cases to give the defendants guidance on who was and who was not a policymaking employee.

Most revealing is the majority's extensive reliance on *Fazio*, a case decided two years *after* the defendants acted. Although the majority is careful to avoid citing it in Part B of its decision, to reach the conclusion in Part A that

DiRuzza was not a policymaker on these facts, it had to rely heavily on the *Fazio* factors. *Fazio*, however, was decided in 1997, two years *after* Sheriff Heard's actions, and thus cannot be construed against him. If the right had been clearly established by 1995, then presumably the majority could have concluded in Part A that DiRuzza was not a policymaker without ever discussing *Fazio*. In reaching its conclusion by leaning so heavily on *Fazio*, the majority holds Sheriff Heard and Undersheriff Floyd (who could not have been aware of that decision) to a standard of legal reasoning it cannot meet itself. "Given such an underdeveloped state of the law, the officers in this case cannot have been expected to predict the future course of constitutional law." *Wilson v. Layne*, ___ U.S. ___, 119 S.Ct. 1692, 1701 (1999).[4]

The Supreme Court's splintered and shifting jurisprudence in this area of the law provides the backdrop for the conclusion that it was not clearly established when the defendants acted that DiRuzza was a protected non-policymaker. In *Elrod v. Burns*, 427 U.S. 347 (1976), the first case fashioning such a rule, no rationale could command a majority of the justices. Then in *Branti v. Finkel*, 445 U.S. 507 (1980), the Court shifted the "ultimate inquiry . . . [from] whether the label 'policymaker' or

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[4] Contrary to the majority's assertion in its note 4, I do not suggest that *Fazio* decided for the first time that a non-policymaking employee is protected from retaliation; rather, as the majority's reliance on the case implicitly acknowledges, *Fazio* is the first case which would allow defendants to determine whether a deputy with DiRuzza's job responsibilities was a policymaking employee.

'confidential' fits a particular position" to whether political loyalty "is an appropriate requirement for the effective performance of the public office involved." *Id.* at 518. This formulation of the inquiry caused Justice Stewart who had concurred in *Elrod* to dissent in *Branti*. *See id.* at 520 (Stewart, J., dissenting). Finally, in *O'Hare Truck Serv., Inc. v. City of Northlake*, 518 U.S. 712 (1996), the Supreme Court cast doubt on the rationale underlying the application of the First Amendment to this area and rephrased the standard, shifting from whether political loyalty is essential or needed to whether it is "reasonably appropriate." 518 U.S. at 712.[5]

The lack of clear direction from the Supreme Court in this area has lead to a circuit split on the precise issue before us. As the majority notes, three circuits have upheld the legality of politically motivated dismissals of deputy sheriffs on the ground that they are policymakers. *See Jenkins v. Medford*, 119 F.3d 1156 (4th Cir. 1997) (en banc); *Upton*, 930 F.2d at 1218 (7th Cir.); *Terry v. Cook*, 866 F.2d 373 (11th Cir. 1989). On the other hand, at least two circuits have held that employees in such positions are not policymakers, *see Burns v. County of Cambria*, 971 F.2d

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[5] "It was by no means self-evident whether our First Amendment precedents applied, for as Justice Powell explained in dissent, the patronage practices at issue had been sanctioned by history and had been thought by some to contribute to the effective operation of political parties. If indeed those patronage practices fortify the party system, they may serve important First Amendment interests, since parties promote and generate political discourse." *O'Hare*, 518 U.S. at 717-18 (citations omitted).

1015 (3rd Cir. 1992);[6] *Hall v. Tollett*, 128 F.3d 418 (6th Cir. 1997),[7] yet another that determining the applicability of First Amendment protection requires a fact-specific balancing test, *see McBee v. Jim Hogg County*, 730 F.2d 1009 (5th Cir. 1984) (en banc). Justice Powell predicted this confusion in *Branti*. "The standard articulated by the court is framed in vague and sweeping language certain to create vast uncertainty. Elected and appointed officials at all levels . . . no longer will know when political affiliation is an appropriate consideration in filling a position." 445 U.S. at 524 (Powell, J., dissenting); *see also Rutan v. Republican Party of Illinois*, 497 U.S. 62, 111-113 & nn. 5-21 (1990) (Scalia, J., dissenting) (listing the many conflicting cases regarding which government positions are protected from politically motivated dismissal to illustrate the "inconsistent and unpredictable results"). Nevertheless, peering through all of this legal fog and the nearly unfathomable variations of fact-specific analyses, the majority discerns that Sheriff Heard and Undersheriff Floyd could have known in 1995 that they could not fire Deputy Sheriff DiRuzza for campaigning against him.

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[6] This case does not support the majority's conclusion as much as the majority implies because the extent of the responsibilities of the deputy sheriff in this case was limited to serving process, transporting prisoners and providing court security. *Burns*, 971 F.2d at 1022. DiRuzza's responsibilities and powers were far more extensive.

[7] Contrary to the majority's assertion, its holding is not consistent with *Dickeson v. Quarberg*, 844 F.2d 1435 (10th Cir. 1988). The plaintiffs in *Dickeson* were a *non-deputized* head jailer who job was "housing and feeding prisoners" and a *non-sworn* administrative assistant whose job was "essentially secretarial." *Id.* at 1437, 1443 & n.7. Thus the case is not analogous to this one.

For my part, I simply cannot agree that "the only reasonable conclusion from binding authority [was] that the disputed right existed . . . [such that the Tehama County sheriff and undersheriff] would be on notice of the right, and [are not] qualifiedly immune [when] they acted to offend it." *B.C.*, 192 F.3d at 1268 (quoting *Blueford v. Prunty*, 108 F.3d 251, 255 (9th Cir. 1997)). The tests for determining when political loyalty is an appropriate requirement are "so general that for most positions it is impossible to know whether party affiliation is a permissible requirement until a court renders a decision." *Rutan*, 497 U.S. at 111 (Scalia, J., dissenting). Today's case proves the point. The four Article III judges who have examined this question have reached three different conclusions and two different results. One, the district court judge, ruled that DiRuzza was a policymaker. The three judges on this panel have now held that we do not know enough to decide, but only reached this result after conducting two significantly different analyses of the case law, including a pivotal case that did not even exist when the defendants acted. "If judges thus disagree on a constitutional question, it is unfair to subject police to money damages for picking the losing side of the controversy." *Wilson*, 119 S.Ct. at 1701. Given this level of confusion, "[e]ach of [the] defendants could 'have believed that [his] conduct was lawful.' " *B.C.*, 192 F.3d at 1268 (quoting *Jensen v. City of Oxnard*, 145 F.3d 1078, 1086 (9th Cir. 1998)). As no case law by 1995 clearly established that the Constitution protected Deputy DiRuzza's political disloyalty, I would affirm the district court's decision that the defendants are qualifiedly immune.

IV

Qualified immunity protects all but the plainly incompetent and the willful violators of the law. A public official should not be held to such high standards of clairvoyance that he is civilly liable for failing to comply with legal authority that did not even exist when he acted. I must respectfully dissent.

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF CALIFORNIA

SHEROL DiRUZZA,

Plaintiff,

v.

COUNTY OF TEHAMA et al.,

Defendants.

NO. CIV. S-96-596 WBS/PAN

MEMORANDUM AND ORDER

(Filed March 4, 1998)

Plaintiff Sherol DiRuzza filed this action asserting claims under 42 U.S.C. §§ 1983 and 1985 and various state law claims arising out of an alleged adverse employment action by defendants County of Tehama, Sheriff Robert Heard, and Undersheriff Jerry Floyd. Defendants move for a summary judgment.

Plaintiff supported Mike Blanusa in the election for Tehama County Sheriff, which was lost to Robert Heard. She claims that Heard and Floyd retaliated against her because of her support for Blanusa. Specifically, she alleges that she as the only deputy sheriff not re-sworn, was given undesirable assignments inconsistent with her seniority, received bad shifts such as graveyard, and was denied patrol duty. Further, plaintiff claims she was compelled to resign as a deputy sheriff under threat of a felony charge. Defendants argue that all the alleged adverse employment actions were due to the pending

felony charge of negligent discharge of her service weapon.[1]

STANDARD OF REVIEW

Summary judgment is appropriate if the record, read in the light most favorable to the non-moving party, demonstrates no genuine issue of material fact. *Celotex Corp. v. Catrett*, 477 U.S. 317, 322 (1986). Material facts are those necessary to the proof or defense of a claim, and are determined by reference to the substantive law. *See Anderson v. Liberty Lobby*, 477 U.S. 242, 248 (1986). At the summary judgment stage the question before the court is whether there are genuine issues for trial. The court does not weigh evidence or assess credibility. *Id.*

ANALYSIS

1. First Amendment Violations

If the position of deputy sheriff in Tehama County is one for which partisan considerations are an appropriate requirement for the effective performance of the job,

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[1] Plaintiff was involved in an altercation with her boyfriend during which she discharged her service weapon. An investigation followed, after which then-Sheriff Blanusa suspended plaintiff for 30 days without pay. The charges were forwarded to the District Attorney who filed a felony charge against plaintiff; the court determined that the charge was supported by probable cause. Ultimately plaintiff agreed to plea bargain by which she agreed to resign from her position at the Sheriff's Department and plead guilty to an infraction. The resignation stated that plaintiff resigned "voluntarily and with full knowledge of the consequences." Defendants' Ex. A.

DiRuzza could be terminated for political reasons and there would be no underlying constitutional violation to support her section 1983 and 1985 claims. *See Fazio v. City and County of San Francisco*, 125 F.3d 1328 (9th Cir. 1997). While it is generally unconstitutional for a public employer to terminate employees for exercising their first amendment rights, *Pickering v. Board of Education*, 391 U.S. 563, 568 (1968), there is an exception where the public employee is a "policymaker." So-called patronage dismissals of policymakers are constitutionally permissible. *Elrod v. Burns*, 427 U.S. 347 (1976). A position is subject to this exception when "the hiring authority can demonstrate that party affiliation is an appropriate requirement for the effective performance of the public office involved." *Branti v. Finkel*, 445 U.S. 507, 518 (1980).[2]

The Ninth Circuit has not addressed the issue of whether deputy sheriffs can be terminated for partisan reasons, though it recently held that it was permissible for a District Attorney to fire an assistant district attorney when that attorney filed to run for District Attorney. *Fazio v. City and County of San Francisco*, 125 F.3d 1329 (9th Cir. 1997). An assistant district attorney, the court found, exercises sufficient discretion in the implementation of policy that partisanship is an appropriate requirement for the performance of the office involved. *Id.* at 1333-34.

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[2] The Supreme Court recently reaffirmed this test. *O'Hare Truck Service, Inc. v. City of Northlake*, 116 S.Ct. 2353, 2355 (1996) ("Government officials may not discharge public employees for refusing to support a political party or its candidates, unless political affiliation is a reasonably appropriate requirement for the job in question.") (extending *Elrod-Branti* to independent contractors).

Accordingly, the campaigning assistant district attorney could be terminated for partisan reasons alone. *Id.* at 1334.[3]

Other circuits, however, have specifically addressed the applicability of the *Elrod-Branti* doctrine to deputy sheriffs. In *Upton v. Thompson*, 930 F.2d 1209 (7th Cir. 1991), the Seventh Circuit held that "deputy sheriffs operate with a sufficient level of autonomy and discretionary authority to justify a sheriff's use of political considerations when determining who will serve as deputies." *Id.* at 1218. The Seventh Circuit has also held that a sheriff could, without violating the constitution, place a deputy sheriff who had announced his candidacy for sheriff on unpaid leave until after the election. *Wilbur v. Mahan*, 3 F.3d 214 (7th Cir. 1993) (Posner, J.).

The Fourth Circuit, sitting *en banc*, held that North Carolina deputy sheriffs are policy makers. *Jenkins v. Medford*, 119 F.3d 1156, (4th Cir. 1997) (en banc), *cert. denied*, 118 S.Ct. 881 (1998). Indeed, the court held that "newly elected or reelected sheriffs may dismiss deputies either because of party affiliation or campaign activity." *Id.* at 1164. The plaintiffs in *Jenkins* were former deputy sheriffs who had allegedly been fired for failing to support the victorious sheriff. The court held that "[b]ecause

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[3] *See also Soelter v. King County*, 931 F. Supp. 741 (W.D. Wash. 1996), *aff'd*, 132 F.3d 40 (9th Cir. 1997) (Manager of Elections and Records a position for which party affiliation and loyalty are appropriate requirements).

they campaigned for [the sheriff's] opponents, the deputies . . . had no constitutional right to continued employment after the election, and so have failed to state a claim under 42 U.S.C. § 1983." *Id.* at 1164.

The Eleventh Circuit has also determined that deputy sheriffs may be fired for political reasons. "The closeness and cooperation required between sheriffs and their deputies necessitates the sheriff's absolute authority over their appointment and/or retention." *Terry v. Cook,* 866 F.2d 373, 377 (11th Cir. 1989).

The court finds these decisions of the Fourth, Seventh, and Eleventh Circuits persuasive and well-reasoned, particularly when applied to one of the smaller counties such as Tehama. In California, deputy sheriffs exercise the same general authority as the Sheriff. Cal. Gov. Code § 24100; *California v. Woods,* 7 Cal.App.3d 382, 387 (1970) ("a deputy sheriff possesses all the powers and may perform all the duties attached to his principal's office"). The goals and policies that the Sheriff was elected to implement depend largely on the discretionary duties of deputies, who have broad autonomy in effectuating the Sheriff's goals. *Cf. Fazio,* 125 F.3d at 1333-34 (assistant district attorney a policymaker for similar reasons). "A deputy sheriff, in implementing the Sheriff's basic policy, will 'make some decisions that will actually create policy.' " *Upton v. Thompson,* 930 F.2d 1209, 1215 (7th Cir. 1991) (citation omitted).

Therefore, to implement the policies on which he was elected, Sheriff Heard is entitled to condition employment on political support, and he need not retain those

that actively opposed him.[4] "Under the *Elrod-Branti* standard, loyalty to the individual sheriff and the goals and policies he seeks to implement through his office is an appropriate requirement for the effective performance of a deputy sheriff." *Terry*, 866 F.2d at 377.[5]

2. Qualified Immunity

Alternatively, Heard and Floyd are entitled to qualified immunity. *See Harlow v. Fitzgerald*, 457 U.S. 800, 817-19 (1982).

Governmental officials who perform discretionary functions are entitled to qualified immunity only "insofar as their conduct does not violate clearly established statutory or constitutional rights of which a reasonable person would have known." *Id.* at 818. The determination of qualified immunity requires: (1) the identification of the specific right allegedly violated; (2) the determination of whether the right was so "clearly established" as to alert a reasonable officer to its constitutional parameters; and (3) the ultimate determination of whether a reasonable

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[4] Therefore, a sheriff's assertion that he will "clean house" upon his election is merely an aggressive campaign promise, not evidence of an intent to discriminate.

[5] The Sheriff in *Terry* refused to rehire any of his predecessor's employees. *Terry*, 866 F.2d at 374. Plaintiff argues that such "en masse" actions make *Terry* distinguishable. However, nothing in *Terry* suggests that a Sheriff cannot terminate only the most vocal supporters of his opponents. Moreover, in *Fazio*, the Ninth Circuit permitted the politically motivated termination of a single employee. *Fazio*, 125 F.3d at 1334.

officer could have believed lawful the particular conduct at issue. *Newell v. Sauser*, 79 F.3d 115, 117 (9th Cir. 1996); *Alexander v. City and County of San Francisco*, 29 F.2d 1355, 1363-64 (9th Cir. 1994).

A right is "clearly established" if the only reasonable conclusion from binding authority is that the disputed right exists. *Gabbert v. Conn*, 131 F.3d 793, 801 (9th Cir. 1997) (*citing Blueford v. Prunty*, 108 F.3d 251, 255 (9th Cir. 1997)). "The contours of the right must be sufficiently clear that a reasonable official would understand that what he is doing violates that right." *Anderson v. Creighton*, 483 U.S. 635, 640 (1987). To allow plaintiffs to assert rights at a high level of generality would destroy the balance between vindicating citizens' constitutional rights and the effective performance of public officials' duties. *Id.* at 639-40. While it is not necessary for the very right in question to have been held unlawful, the "unlawfulness must be apparent" from pre-existing law. *Mendoza v. Block*, 27 F.3d 1357, 1361 (9th Cir. 1994) (*citing Anderson*, 483 U.S. at 640).[6]

The burden of showing that a right is "clearly established" is on the plaintiff. *Maraziti v. First Interstate Bank of California*, 953 F.2d 520, 523 (9th Cir. 1992). DiRuzza characterizes the right asserted as a public employee's freedom to speak on matters of public concern without retaliation. *See Allen v. Scribner*, 812 F.2d 426, 436 (9th Cir. 1987). This characterization is too general. The specific

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[6] The events DiRuzza complains of occurred in 1995 so that is the relevant date to determine the state of the law for purposes of determining whether there was a "clearly established" right.

right asserted by DiRuzza is that a deputy sheriff should be able to speak on partisan issues without fear of reprisal. This right, in turn, depends on whether a deputy sheriff is a policymaker, a position for which partisan hiring and firing is appropriate. It is not clearly established that deputy sheriffs are not policymakers. In fact, plaintiff cites no binding authority for the propositions that it is illegal for a sheriff to terminate a deputy sheriff for political reasons.[7] To the contrary, as indicated above, the trend in the circuit courts is to find that deputy sheriffs are positions for which party affiliation is an appropriate requirement for effective performance.

Therefore, DiRuzza has not shown a violation of any right that was "clearly established" at the time of the alleged violation. Accordingly, Heard and Floyd are entitled to qualified immunity. *Accord Cagle v. Gilley*, 957 F.2 1347 (6th Cir. 1992) (sheriff who failed to rehire deputies allegedly based on political support of opponent entitled to qualified immunity); *Upton v. Thompson*, 930 F.2d 1209, 1217-18 (7th Cir. 1991) (sheriff who fired based on political affiliation entitled to qualified immunity).

3. Liability of the County

Because the County of Tehama's liability under §§ 1983 or 1985 is dependent on the finding of a constitutional injury by Heard or Floyd, the finding either of their

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[7] *See also Stott v. Haworth*, 916 F.2d 134, 144 (4th Cir. 1990) ("It is also clear that application of *Elrod-Branti* in the various jurisdictions has produced seemingly inconsistent and unpredictable results.").

rights to terminate DiRuzza or of qualified immunity precludes a finding of liability on the part of the County. Absent a first amendment violation, the evidence indicates that plaintiff resigned under the plea agreement negotiated with the District Attorney, not under pressure from the defendants. The other allegedly retaliatory actions were in response to the pending felony charges.

4. State Law claims

Because the court grants summary judgment on plaintiff's federal claims, the court declines to exercise supplemental jurisdiction over plaintiff's remaining state law claims. 28 U.S.C. § 1367(c); *see Gini v. Las Vegas Metropolitan Police Dept.*, 40 F.3d 1041, 1046 (9th Cir. 1994) (when federal law claims are eliminated before trial, court should generally decline to exercise supplemental jurisdiction over state law claims). The state law claims will therefore be dismissed subject to the statute of limitations tolling provisions of 28 U.S.C. § 1367(d).

IT IS THEREFORE ORDERED that defendants' motion for summary judgment on plaintiff's §§ 1983 and 1985 claims be, and the same hereby is, GRANTED. IT IS FURTHER ORDERED that plaintiff's state law claims are dismissed pursuant to 28 U.S.C. § 1367(c). Let judgment be entered accordingly.

DATED: March 2, 1998

/s/ William B. Shubb
WILLIAM B. SHUBB
UNITED STATES
DISTRICT JUDGE

NOT FOR PUBLICATION

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

SHEROL DIRUZZA, aka Sherol Janc, Plaintiff-Appellant, v. COUNTY OF TEHAMA, a public entity; ROBERT HEARD, as an individual and as Sheriff for the County of Tehama; JERRY FLOYD, as an individual and as Undersheriff of the County of Tehama, Defendants-Appellees.	No. 98-15997 D.C. No. CV-96-00596-WBS **ORDER** (Filed June 7, 2000)

Before: REINHARDT, O'SCANNLAIN, and W. FLETCHER, Circuit Judges

A majority of the judges on the panel has voted to deny the petition for rehearing and to deny the petition for rehearing en banc. Judge O'Scannlain has voted to grant the petition for rehearing and to grant the petition for rehearing en banc.

The full court has been advised of the petition for en banc rehearing, and no judge of the court has requested a vote on the petition for rehearing en banc. Fed. R. App. P. 35(b).

The petition for rehearing and the petition for rehearing en banc are DENIED.